

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEVELOPERS SURETY & INDEMNITY
CO.,

No.

Plaintiff,

COMPLAINT FOR DECLARATORY JUDGMENT

vs.

JURY DEMAND

JONATHAN WOLFSON GENERAL
CONTRACTING LLC, and JONATHAN
WOLFSON,

Defendants.

Plaintiff Developers Surety & Indemnity Co. (“DSI”), states a cause of action for Declaratory Judgment pursuant to 28 U.S.C. §2201 against Defendants Jonathan Wolfson General Contracting, LLC (“JWGC”), and Jonathan Wolfson (“Wolfson”), seeking a declaration of DSI’s rights and duties under commercial general liability policy numbers BIS00019786-01 and BIS00019786-02.

I. PARTIES

1.1 DSI is a foreign insurance company, and is an authorized insurer in the State of Washington. DSI is an Iowa corporation, and has its principal place of business in California. DSI has satisfied all prerequisites to filing this lawsuit.

1 1.2 JWGC is a Washington limited liability company located in Eastsound,
2 Washington.

3 1.3 Wolfson is identified as the registered agent and governor of JWGC, residing in
4 Eastsound, Washington, in the records of the Washington Secretary of State, Corporations
5 Division. On information and belief, Wolfson is a citizen of Washington.

6 **II. JURISDICTION AND VENUE**

7 2.1 This Court has subject matter jurisdiction over this action for declaratory
8 judgment pursuant to 28 U.S.C. §1332, because an actual justiciable controversy exists between
9 the parties related to their relative rights and obligations, the plaintiff is a citizen of a different
10 state than the defendants, and the amount in controversy exceeds \$75,000.

11 2.2 The District Court for the Western District of Washington has personal
12 jurisdiction over the defendants in this lawsuit, as they are residents and citizens of the State of
13 Washington.

14 2.3 The Western District of Washington is the proper venue for this lawsuit pursuant
15 to 28 U.S.C. §1391, because the defendants reside in the Western District of Washington, and
16 certain of the acts alleged herein occurred in San Juan County, Washington, within the Western
17 District of Washington.

18 **III. FACTS RELATED TO THE UNDERLYING ACTION**

19 3.1 JWGC filed a complaint against Kanwaljit S. Marok (“Marok”) in the Superior
20 Court of Washington, San Juan County, under case number 16-2-05130-09 (“the underlying
21 litigation”). In its complaint, JWGC alleged it entered a construction contract with Marok,
22 dated September 16, 2015, for “repairs and completion” of Marok’s residential home located at
23

1 487 Vusario Lane, Eastsound, Washington 98245 (“the Project” or “the Property”). JWGC
 2 asserted five claims against Marok and sought \$62,974.68, plus interest, in connection with the
 3 construction contract and labor, services, equipment, and material for the Project, as well as
 4 amounts over \$4,969.46 for increases in JWGC’s annual bond premiums.

5 3.2 In its complaint against Marok, JWGC alleged that “prior to Marok’s execution
 6 of the September 16, 2015 Construction Contract with Wolfson, Marok had a contract with
 7 another general contractor, Green Building Innovations Corp, to commence and perform the
 8 construction of Marok’s single-family residence at [the Property].” JWGC further alleged:

9 Plaintiff is informed and believes and on that basis alleges
 10 that the construction contract between Marok and Green
 11 Building Innovations Corp. was terminated and that the
 12 contract between Marok and Green Building Innovations
 13 Corp is the subject of litigation between them in San Juan
 14 County Superior Court Case No. 15-2-05143-2. It is the
 15 construction work of Green Building Innovations Corp.
 16 under its contract with Marok that is the **“repairs and
 17 completion of [Marok’s] single family residence at 487
 18 Vusario Lane, Eastsound, WA 98245** that is the subject of
 19 the Construction Contract between Marok and Wolfson,
 20 and the basis of this Complaint by Wolfson.

21 3.3 In response to JWGC’s complaint, Marok asserted two counterclaims, for breach
 22 of contract and violations of the Washington State Consumer Protection Act, against JWGC in
 23 the underlying litigation. Marok also asserted a third-party claim against Wolfson for violation
 24 of the Washington State Consumer Protection Act.

25 3.4 In support of his claims in the underlying litigation, Marok alleged that he
 26 entered a contract with JWGC “[o]n or about September 17, 2015 . . . to install a roof on the
 27 single family home” at the Property. Marok alleged that he entered another contract with
 28 JWGC “[o]n or about October 24, 2015 . . . for the remediation and completion of the single

1 family home to be constructed at the Property.” Marok alleged that JWGC “agreed to complete
 2 the agreed scope of work for the fixed price of \$245,567.53.”

3 3.5 Marok alleged that JWGC submitted invoices that did not comply with the
 4 contract, that there were problems with the construction, and that Wolfson made “false,
 5 disparaging, and slanderous comments about Marok to Marok’s own contractors, and to
 6 Wolfson’s subcontractors.” Marok alleged that “[g]iven the baseless and incomplete billings,
 7 the indication of water leaks and damage, Wolfson’s refusal and/or inability to follow the
 8 agreed designs and plans, and Wolfson’s erratic behavior, Marok hired a building envelope
 9 consultant to inspect the work to date on February 23, 2016.” Marok alleged that the building
 10 envelope consultant found numerous alleged defects.

11 3.6 In his counterclaim for breach of contract, Marok alleged that JWGC “breached
 12 the parties’ Contract by failing to complete the project on time and in accordance with the
 13 agreed fixed-price Contract, and by failing to comply with the building standards in the
 14 Contract” and that Marok “has suffered substantial damages for the cost to repair the defects
 15 and resulting property damage, including loss of use, all in an amount to be proven at trial.”

16 3.7 In his counterclaim entitled “Violations of the Washington State Consumer
 17 Protection Act,” Marok alleged:

18 Wolfson made numerous representations about its
 19 experience, abilities, and prior clients in convincing
 20 Counterclaimant to choose Wolfson over a competing
 21 contractor. Then during the course of the work, Wolfson
 22 performed substandard work while billing far above the full
 23 contract price. Wolfson caused significant physical
 damage to tangible property in the home and excessively
 billed Marok given the amount and quality of work
 performed. Wolfson also repeatedly billed Marok for
 materials Wolfson contracted [to] buy, including stain and

finish materials. Wolfson's actions and representations constituted unfair or deceptive acts in trade and commerce which affected the public interest. These unfair and deceptive acts are capable of repetition, and they have caused damages to Counterclaimant. Consequently, these acts were in violation of the Consumer Protection Act, RCW Ch. 19.86.

3.8 In his Third-Party Complaint against Wolfson, Marok alleged Wolfson is the owner of JWGC, incorporates Marok's counterclaim allegations, and restates the allegations identified in paragraph 3.7 above. On the basis of those allegations, Marok asserts a claim against Wolfson "under the responsible corporate officer doctrine" for violations of the Consumer Protection Act.

3.9 On information and belief, the underlying litigation is subject to arbitration and has been assigned to an arbitrator.

3.10 Prior to the filing of the underlying litigation, Marok filed a complaint, dated October 9, 2015, against Green Building Innovations Corp (“Green Building”) in Washington Superior Court, San Juan County, Case No. 15-2-05143-2 (“the Green Building Lawsuit”). In Marok’s complaint against Green Building, Marok alleged that “[o]n or about April 27, 2014, plaintiff entered into a contract . . . with Green Building for the construction of a single family home to be constructed at the Property.”

3.11 In the Green Building Lawsuit, Marok further alleged that “Green Building was responsible for fully executing the work described in the contract document, providing all employees, subcontractors, specified material, people, and equipment suppliers for all work related to the project, providing all materials unless specifically outlined in the Contract and completing the project in 9 months after the receipt of an approved building permit . . .”

1 Marok alleged that he discovered numerous and substantial construction defects in the Project
 2 in 2015 and that Green Building refused to return to the Project.

3 **IV. FACTS RELATED TO THE DSM POLICIES**

4 4.1 DSM issued commercial general liability policy numbers BIS00019786-01 and
 5 BIS00019786-02 (collectively, the “Policies”) to JWGC for the policy periods August 20, 2014
 6 to August 20, 2015, and August 20, 2015 to August 20, 2016, respectively. The Policies are
 7 identical in relevant respects except for the policy periods to which each applies.

8 4.2 The Policies’ insuring agreement under Coverage A provides that DSM will pay
 9 those sums that the insured becomes legally obligated to pay as damages because of “property
 10 damage” to which the Policies apply and that the insurance applies to “property damage” only
 11 if the “property damage” is caused by an “occurrence” and if the “property damage” occurs
 12 during the policy period.

13 4.3 The Policies include the following definitions:

14 13. “Occurrence” means an accident, including
 15 continuous or repeated exposure to substantially the
 16 same general harmful conditions.
 17 ...

18 17. “Property damage” means:

19 a. Physical injury to tangible property,
 20 including all resulting loss of use of that
 21 property. All such loss of use shall be
 22 deemed to occur at the time of the physical
 23 injury that caused it; or
 24 b. Loss of use of tangible property that is not
 25 physically injured. All such loss of use shall
 26 be deemed to occur at the time of the
 27 “occurrence” that caused it.

1 For the purposes of this insurance, electronic data is
2 not tangible property.

3 4.4 The Policies' include the following exclusions under Coverage A:

4 This insurance does not apply to:

5 **j. Damage To Property**

6 "Property damage" to:

7 ...

8 (5) That particular part of real property on
9 which you or any contractors or
10 subcontractors working directly or indirectly
11 on your behalf are performing operations, if
12 the "property damage" arises out of those
13 operation; or

14 (6) That particular part of any property that
15 must be restored, repaired or replaced
16 because "your work" was incorrectly
17 performed on it. ...

18 ...

19 Paragraph (6) of this exclusion does not apply to
20 "property damage" included in the "products-
21 completed operations hazard".

22 ...

23 **l. Damage To Your Work**

24 "Property damage" to "your work" arising out of it
25 or any part of it and included in the "products-
26 completed operations hazard".

27 This exclusion does not apply if the damaged work
28 or the work out of which the damage arises was
29 performed on your behalf by a subcontractor.

30 4.5 The Policies' insuring agreement under Coverage B provides that DSI will pay

31 those sums that the insured becomes legally obligated to pay as damages because of "personal
32 and advertising injury" to which the Policies apply, but only if the offense was committed

1 during the policy period.

2 4.6 The Policies define “personal and advertising injury,” in relevant part, as:

3 14. “Personal and advertising injury” means injury,
4 including consequential “bodily injury”, arising out
5 of one or more of the following offenses:

6 ...

7 d. Oral or written publication, in any manner,
8 of material that slanders or libels a person or
9 organization or disparages a person’s or
10 organization’s goods, products or services;

11 4.7 The Policies’ include the following exclusions under Coverage B:

12 This insurance does not apply to:

13 a. **Knowing Violation Of Rights Of Another**

14 “Personal and advertising injury” caused by or at
15 the direction of the insured with the knowledge that
16 the act would violate the rights of another and
17 would inflict “personal and advertising injury”.

18 b. **Material Published With Knowledge Of Falsity**

19 “Personal and advertising injury” arising out of oral
20 or written publication, in any manner, of material, if
21 done by or at the direction of the insured with
22 knowledge of its falsity.

23 f. **Breach Of Contract**

18 “Personal and advertising injury” arising out of a
19 breach of contract, except an implied contract to use
20 another’s advertising idea in your “advertisement”.

21 g. **Quality Or Performance Of Goods – Failure To
22 Conform To Statements**

23 “Personal and advertising injury” arising out of the
24 failure of goods, products or services to conform
25 with any statement of quality or performance made

1 in your “advertisement”.

2 **h. Wrong Description Of Prices**

3 “Personal and advertising injury” arising out of the
4 wrong description of the price of goods, products or
services stated in your “advertisement”.

5 4.8 The Policies contain the Additional Conditions Endorsement (ID 00 06 01 14),
6 which provides:

7 The following conditions precedent to coverage are added
8 to and form part of the policy:

- 9 1. You must be named an additional insured on the
commercial general liability policy of each
contractor and subcontractor that performs work on
your behalf throughout the time of each such
contractor’s and subcontractor’s performance, and
each such policy must provide defense as well as
indemnity to you as an additional insured.
- 10 2. You must obtain a certificate of insurance from
each contractor and subcontractor that performs
work on your behalf prior to the commencement of
each such contractor’s and subcontractor’s work
indicating that each such contractor and
subcontractor has a commercial general liability
policy in effect.
- 11 3. Both the policy within which you are named as an
additional insured and the certificate of insurance
you obtain must have each occurrence, general
aggregate, and products-completed operations
aggregate limits, including sublimits, in an amount
equal to or greater than this policy.
- 12 4. You must obtain a hold harmless agreement from
each of your contractors and subcontractors,
indemnifying you against all loss in any way related
to work performed on your behalf by each such
contractor and subcontractor.

1 4.9 The Policies include the Exclusion – Takeover of Unfinished Work
2 Endorsement (ID 00 43 01 11), which provides:

3 This insurance does not apply to:

4 “Bodily injury”, “property damage” or “personal and
5 advertising injury” arising out of or in any way related to
any real property where “your work” on or contiguous to
that real property is as a:

6 1. “Takeover contractor”; or
7
8 2. Subcontractor or supplier to a “takeover contractor”

9 “Takeover contractor” means a contractor that continues,
10 completes, finishes, repairs or replaces any work of a
previous contractor on real property that is in the “course of
construction” at the time of “takeover”.

11 “Takeover” means the earlier of the date the “takeover
12 contractor” signs the contract to become a “takeover
contractor” or starts work as a “takeover contractor”.

13 “Course of construction” means that period after
14 construction begins until the entire project has been: (a)
finally accepted by its current owner or purchaser; and (2)
put to its intended use; and (3) permitted for occupancy.

16 4.10 The Policies include the Insuring Agreement Amendment – Use of Extrinsic
17 Evidence – Duty to Defend or Indemnify Endorsement (ID 00 47 01 14), which provides:

18 We may look to extrinsic evidence outside of the
19 allegations and/or facts pleaded by any claimant to
determine whether we owe a duty to defend or indemnify
20 against a “suit” seeking “bodily injury”, “property
damage,” or “personal and advertising injury”. We may
21 rely on extrinsic evidence to deny the defense and/or
indemnity of a “suit”.

1 4.11 The Policies include the Washington Changes – Defense Costs Endorsement,
2 which provides:

3 B. If we initially defend an insured (“insured”) or pay
4 for an insured’s (“insured’s”) defense but later
5 determine that none of the claims (“claims”), for
6 which we provided a defense or defense costs, are
7 covered under this insurance, we have the right to
8 reimbursement for the defense costs we have
9 incurred.

10 The right to reimbursement under this provision
11 will only apply to the costs we have incurred after
12 we notify you in writing that there may not be
13 coverage and that we are reserving our rights to
14 terminate the defense or the payment of defense
15 costs and to seek reimbursement for defense costs.

16 4.12 While various provisions of the Policies could also or further limit, exclude, or
17 define the scope of coverage under the Policies for Marok’s claims against JWGC and Wolfson
18 with respect to the Project, DSI is entitled to relief at this time based on the provisions
19 referenced above.

20 **V. CLAIM FOR DECLARATORY RELIEF**

21 5.1 The allegations in paragraphs 1.1 through 4.12 are incorporated by reference as
22 if fully set forth herein.

23 5.2 The Policies do not provide coverage, for defense or for indemnity, for claims
24 alleged by Marok against JWGC and Wolfson with respect to the Project.

25 5.3 An actual controversy exists between DSI and JWGC and Wolfson regarding
26 coverage under the Policies.

27 5.4 A declaratory judgment will terminate the controversy and remove uncertainty
28 regarding the rights and duties of the parties under the policy with respect to the underlying
29

1 action.

2 5.5 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, DSI demands trial
3 by jury in this action of all issues so triable.

4 **VI. PRAYER FOR RELIEF**

5 WHEREFORE, DSI prays for relief as follows:

6 6.1 A declaratory judgment establishing that DSI has no obligations under the
7 Policies to defend or indemnify JWGC and Wolfson against the claims asserted by Marok with
8 respect to the Project.

9 6.2 A declaratory judgment establishing that JWGC and Wolfson must reimburse
10 DSI for all defense costs DSI has paid to defend JWGC and Wolfson in the underlying
11 litigation.

12 6.3 An award of such attorneys' fees, costs, and expenses as are authorized by law.

13 6.4 Such other relief as the Court deems just and equitable.

14 DATED this 4th day of October, 2017.

15 *s/Kenneth J. Cusack*
16 _____

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